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(1)

Supreme Court, U.S.

FILED

JUL 17 1989

JOSEPH F. SPANGL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES

No _____

October Term, 1989

Rochelle Konits,

Petitioner,

v

The People of the State of New York,

Respondents.

Petition for a Writ of
Certiorari to the Supreme Court of
the State of New York, Appellate
Division, Second Judicial
Department.

Ronald Podolsky
Attorney for Petitioner
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New York, N.Y. 10038

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I. QUESTIONS PRESENTED

Is there a denial of due process of law under the 5th, 6th and 14th Amendments when a trial judge who is aware of a defendant's dispute with defense counsel respecting the defendant's desire to testify in her own behalf, urges that defendant to follow her counsel's advice not to testify, which advice is then followed, and the defendant is convicted.

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-II. Parties

Rochelle Konits, Petitioner,
The People of the State of New
York, Respondents.



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Office Division of
Federal Bureau of Investigation
Washington, D. C.
1900

III. Authorities cited:

Carter v Illinois, 329 US 173 18

People v Baker, 28 AD2d 24, rev
other gnds 23 NY2d 307 18

People v DeJesus, 42 NY2d 519 20

Poe v United States, 233 F.Supp 18

193 (Dist C. D.C. 1964) affd 352
F2d 639. 18

Richards v United States, 318 F2d
639 (9th Cir. 1963) 17, 18

United States Constitution

Fifth Amendment 20

Sixth Amendment 21

Fourteenth Amendment 20



IV. Opinions Below.

The People of the State of New York, Appellate Division, Second Department, ____AD2d____ (1989) reproduced at A1.

V. Jurisdictional Statement.

Jurisdiction is conferred by reason of 28 USC 1254 in that it is alleged that the Petitioner was deprived of due process of law in a criminal conviction procured by the state in violation of the due process of law requirements and right to counsel requirements of the



United States Constitution.

Petitioner was convicted after a jury trial in Nassau County Court, of the felony of criminal possession of a controlled substance in the 5th degree, and misdemeanor charges of violation of the Public Health Law and of conspiracy. On December 5 1985, she was sentenced to five years probation.

The judgment was affirmed in the Supreme Court, State of New York, Appellate Division, Second Department on March 12, 1990 (A1). Leave to Appeal to the Court of Appeals was denied on May 25, 1990. The issue herein raised was argued



in the Supreme Court, State of New York, Appellate Division, Second Judicial Department, and was also urged upon the NewYork Court of Appeals in the application for leave to appeal, which application was denied May 25, 1990.

VI. Constitution and Statutes Cited:

United States Constitution

Fifth Amendment: No person shall be held to answer for a captial, or otherwise infamous crime, unless on a presentment or indictment of a Greand Jury, except in cases arising in the land and naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be



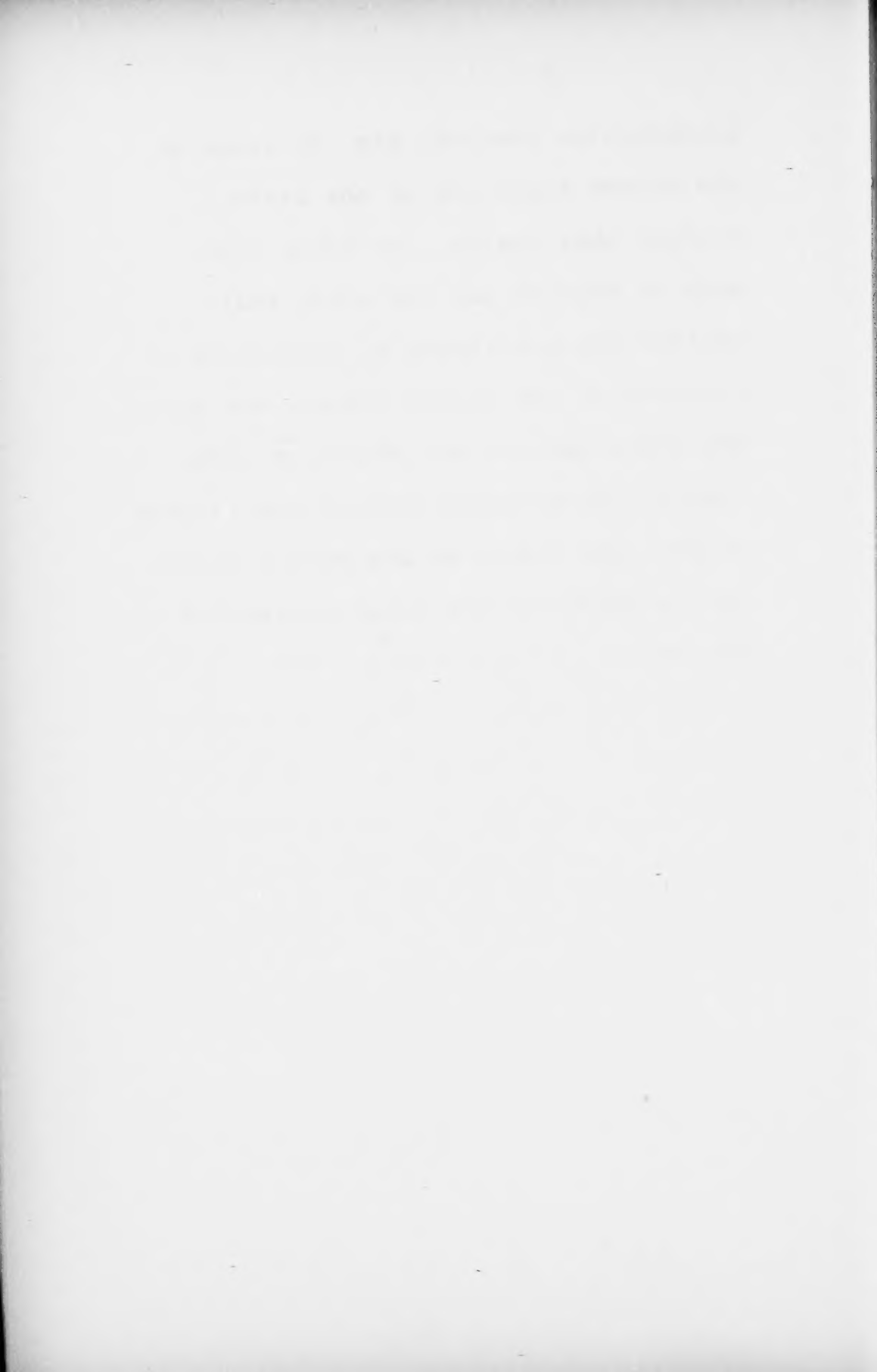
deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

14th Amendment: Section 1. All persons born or naturalized in the United States and subject to the



jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



VII. STATEMENT OF THE CASE

On December 5, 1985 the Petitioner, a medical doctor, was convicted in Nassau County Court, New York, of the felony of criminal sale of a controlled substance in the fifth degree and misdemeanor charges of conspiracy, and violations of the Public Health Law, and was sentenced to five years probation. The sole issue presented here concerns whether the procedure followed by the trial court during the trial violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The record reveals that there was a ongoing dispute between the Petitioner and her defense counsel respecting whether or not she should testify in her own defense. During the pretrial hearing respecting the admissability of certain evidence, the Petitioner insisted on



testifying, and the defense counsel resisted that request. The trial court informed defense counsel that it was the defendant's choice, whereupon the Petitioner took the stand. When counsel refused to question her, the court threatened to hold him in contempt, whereupon she testified without further incident.

The Petitioner had interposed the affirmative defense of duress. During the jury trial, the prosecution, after presenting documentary evidence and testimony rested. A motion to dismiss for failure to prove a prima facie case was denied. Thereafter counsel and petitioner were again in dispute in the presence of the trial judge respecting whether she should testify. Whereupon the following took place:

THE COURT: However, I



would finally, once again, in conclusion to urge you in the strongest terms possible to listen to, consider, and, indeed follow your counsel's advice.

THE DEFENDANT: Then I'll tell you, sir, I'm not following counsel's advice. I just wanted for the record to be known that I consider the People's alleged addicts to be on parole, totally with personal motives. *****
(T879)

THE COURT: *** I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not to testify.***

The trial then went forward without the testimony of the Petitioner. The defense counsel withdrew the affirmative defense of duress theretofore pleaded. (A7) Thereafter the Petitioner was convicted of all counts considered by the jury. On December 5, 1985 she was sentenced to five years probation which she is still serving. The Supreme Court of the State of New York, Appellate Division, Second Department affirmed the judgment of conviction.



The Court of Appeals denied leave to appeal on May 25, 1990. The issue of whether the statement of the trial judge was a violation of the United States Constitution was raised in the Supreme Court, Appellate Division.



VIII. Reasons For Granting the Writ.

The trial court improperly became a partisan in support of a defense attorney who was in an ongoing dispute with the client respecting the client's decision to testify in her own defense at her trial. This action by the court presents a violation of the Sixth Amendment and due process component of the 14th Amendment to the United States Constitution. The court action rendered Petitioner's final decision not to testify one based on coercion and deprivation of free will. It unfairly left prosecution evidence uncontradicted, and deprived her of the defense of duress, and lack of intent, all in violation of the due process component of the Sixth and Fourteenth Amendments.

The desire of the Petitioner to testify in her own defense, and the



court's knowledge thereof predated the trial. At a pre-trial hearing respecting the admissability of certain statements, a dispute arose between Petitioner and defense counsel respecting her desire testify. At that stage, the court intervened and informed the defense counsel that the choice was that of the petitioner. When she took the stand and defense counsel refused to question her, the court threatened counsel with contempt, whereupon, the testimony of the Petitioner was received.

At the trial, the prosecution rested. There existed uncontradicted testimony of the prosecution witnesses. The court denied a motion to dismiss for failure to prove a prima facia case.

The Petitioner insisted on testifying in her own defense, and once again defense counsel advised her in the



presence of the trial judge not to do so.

Whereupon the following transpired:

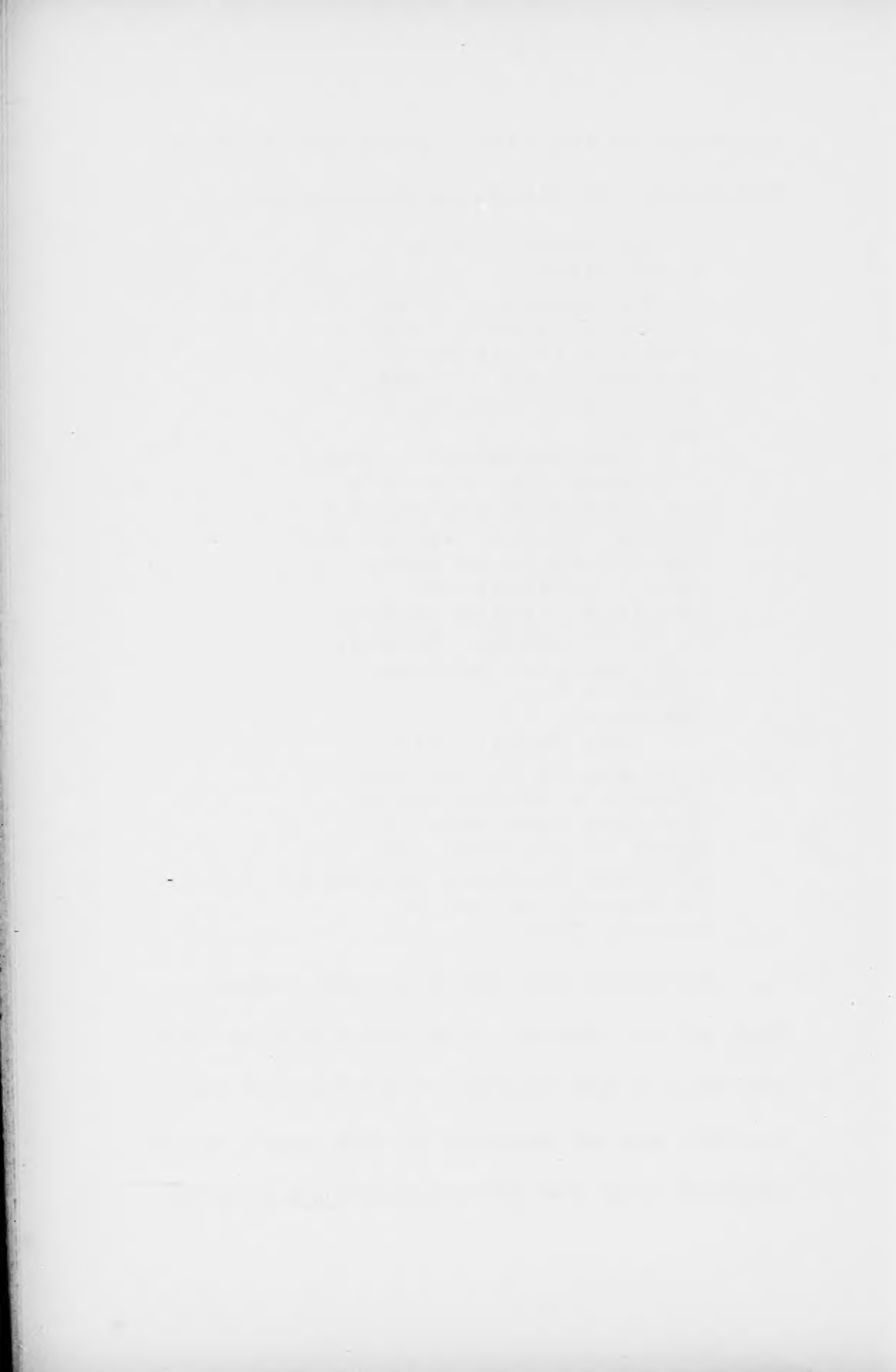
THE COURT: However, I would finally, once again, in conclusion urge you in the strongest terms possible to listen to, consider, and, indeed follow your counsel's advice.

THE DEFENDANT: Then I'll tell you, sir, I'm not following counsel's advice. I just wanted for the record to be known that I consider the People's alleged addicts to be on parole, totally with personal motives.

(T879)

THE COURT: *** I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not to testify.***

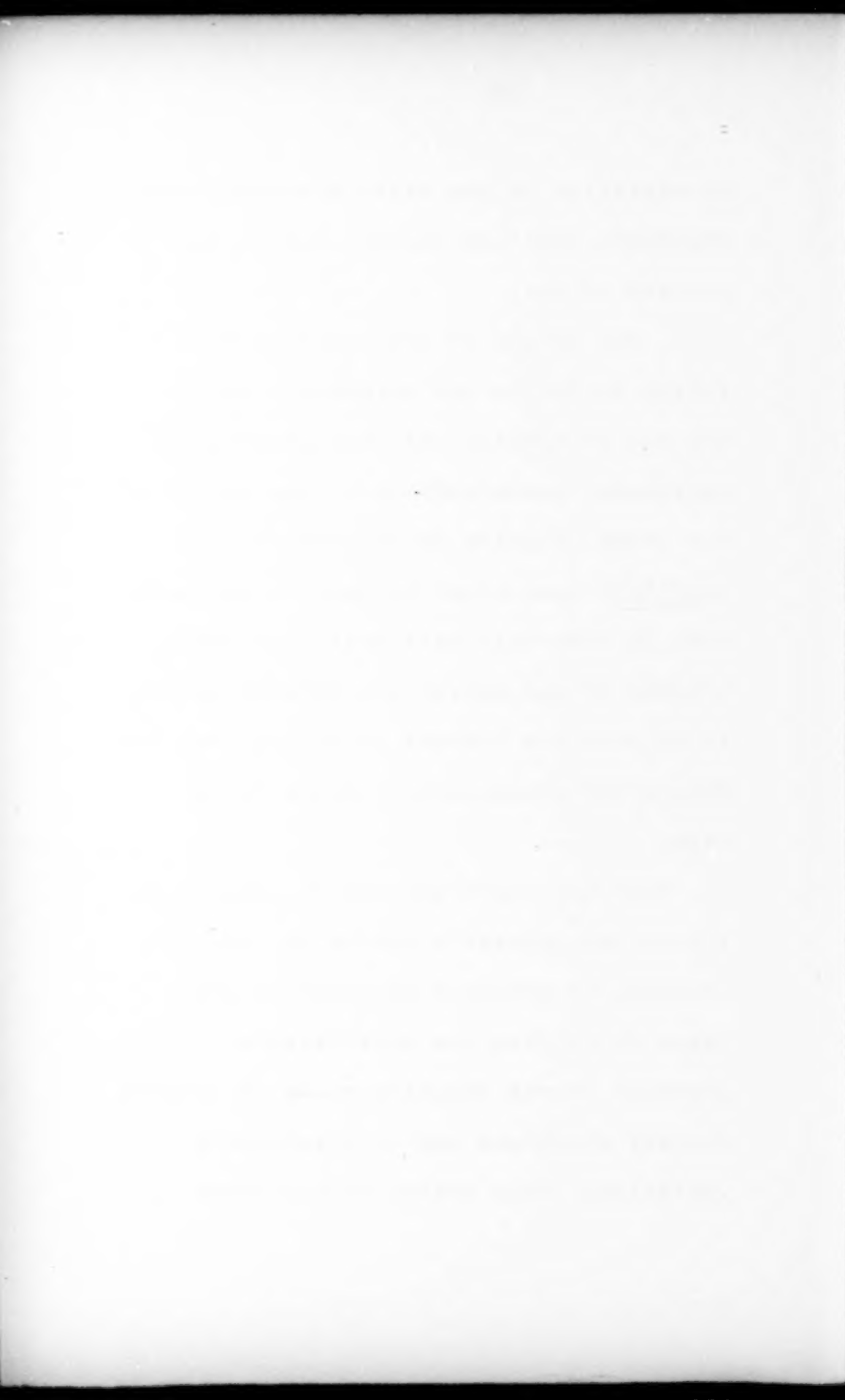
Although the decision was indeed that of Dr. Konits, the court's view that she follow her counsel's advice not to testify was an opinion of the court which entered into the decision making process,



in violation of the Sixth and Fourteenth Amendment right to counsel and to due process of law.

The advice of the court to Dr. Konits to follow her attorney's advice and not to testify left the prosecution testimony, uncontradicted. The advice of the court to waive an important constitutional right to testify was made when it knew full well that just prior thereto it had denied the defense motion to dismiss the charges by ruling that the People had established a prima facia case.

When the court advised Dr. Konits to follow her counsel's advice not to testify, it became a partisan in the issue by lending its considerable prestige to the opposing views of defense counsel which she was so steadfastly resisting. This action of the court



deprived Dr. Konits of free will and knowing waiver. All opposition to counsel's advice collapsed to her prejudice due to the opinion of the court entering the balance. This is reversible error, in that the court was not authorized to give such advice to Dr. Konits in this important matter. See: Richards v United States, 318 F2d 639 (9th Cir. 1963). The court's only legitimate action in this respect was to caution a Dr. Konits to consider very carefully counsel's advice. Under no circumstances could the judge, who is the officer of the state advise a defendant in a criminal case to waive an important constitutional right. The duty of the court after the caution clearly is to remain neutral and offer no personal opinion as to the correct course of action to take.



The fact that a defendant in a criminal matter is represented by counsel does not mean that the defendant is powerless to adopt the course that the defendant believes will best to produce the most desirable outcome. The defendant is the final arbiter of the conduct of his defense. Carter v Illinois, 329 U.S. 173, 174; Peo. v Baker, 28 AD2d 24, 26, rev'd other grounds 23 NY2d 307.

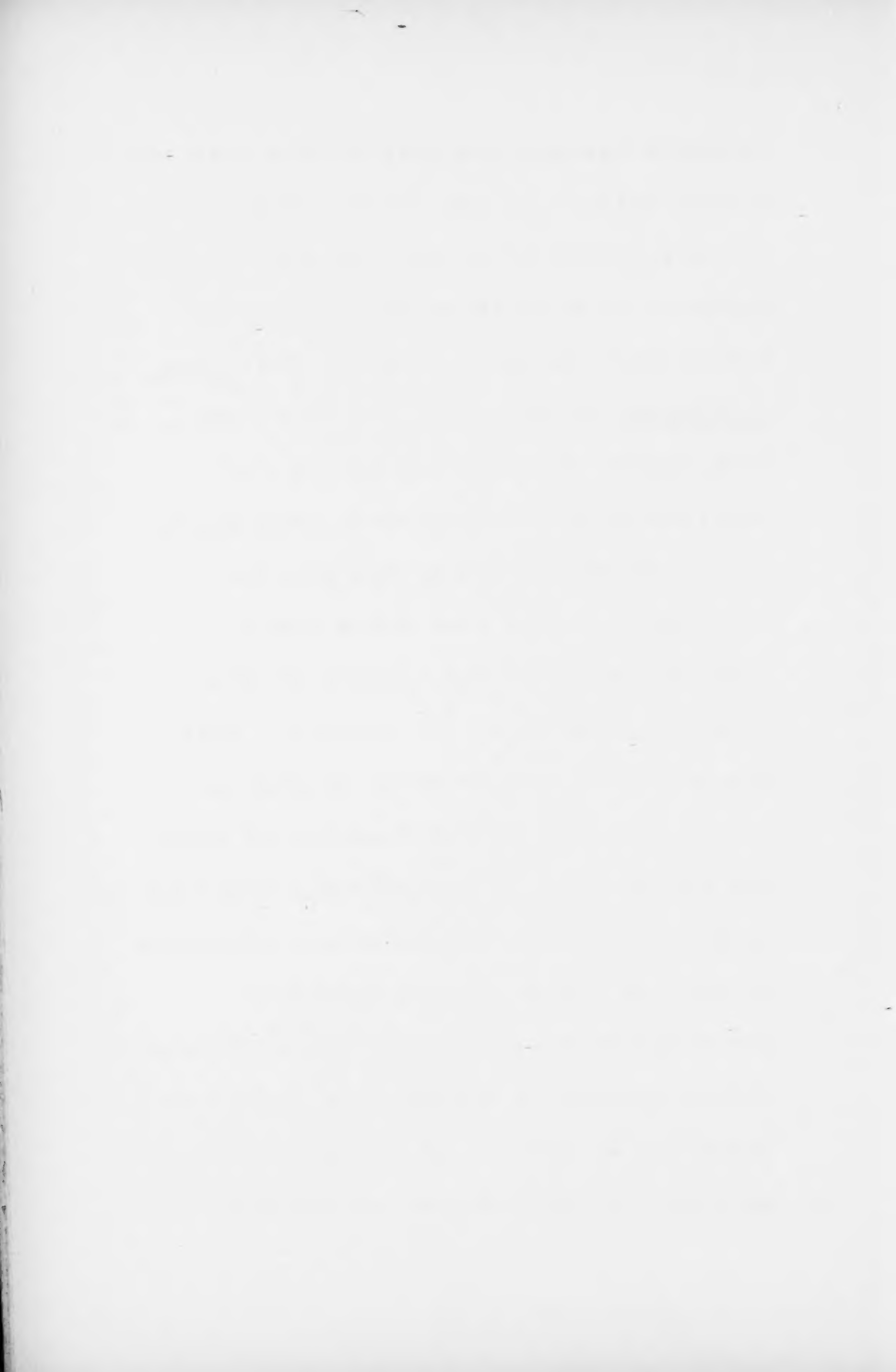
In Richards v United States, supra, reversible error committed when court advised defendant to testify in face of uncontradicted prosecution testimony, thereby enabling the prosecutor to bring in defendant's prior convictions of violation of the same statute, of which convictions the court was unaware. In Poe v United States, 233 F Supp 193, (Dist Ct. D.C. 1964) aff'd 352 F2d 639,



640, the Court did not caution defendant who was in the process of waiving his right to testify when the court was aware that the defense attorney's advice to waive the right to testify was predicated upon a misapprehension of the rules of evidence respecting permitted use of prior defendant statements.

What the court did here differs from cautioning a defendant to consider very carefully the attorney's advice before making the decision which is solely the defendant's to make. Advising a defendant to follow the attorney's advice presents a grave misuse of the omnipresent and awesome power of the court. It brings to bear upon the defendant's decision the opinion of the judge. Inappropriate remarks which might throw the scales out of balance should be scrupulously avoided. Care must be taken

to guard against the possibility that the stated opinion of the trial judge or even the suggestion of an opinion may prove decisive in a decision making process making that decision unfair. See: Peo. v DeJesus, 42 NY2d 519. In this case that misuse of power led to the deprivation of an important Fourteenth & 5th Amendment right to due process. It cannot be said that there was a knowing and uncoerced waiver of the constitutional right to testify. What the court did presented an exceedingly unfair exercise of its position of power and influence. It gratuitously bestowed upon the prosecution the unfair advantage of leaving its proffered testimony uncontradicted, and led to the withdrawal of the defense of duress. As The trial judge was an officer of the state and the partisan and prejudicial advice given to



Dr. Konits was violation of the United States Constitution, Sixth Amendment right to counsel which must be secure from state intrusion.

IX. CONCLUSION: The writ should be granted.

July 13, 1990.

Respectfully Submitted,

Ronald Podolsky

Attorney for Petitioner.



Appendix

Captions Below

Supreme Court of the State of New York
Appellate Division: Second Department

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

-against-

Rochelle Konits,

Defendant-Appellant.

County Court Nassau County
State of New York

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Rochelle Konits,

Defendant.

Indictment No. 60664/85

Ai

State of New York Court of Appeals

BEFORE: HON. STEWART F. HANCOCK, JR., Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

against

CERTIFICATE

DENYING

LEAVE

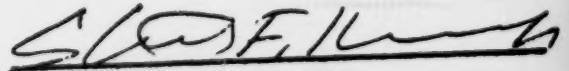
ROCHELLE KONITS

Appellant

I, STEWART F. HANCOCK, JR., Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Manlius, New York

May 25, 19 90



Associate Judge

*Description of Order: Order of the Appellate Division, Second Department of March 12, 1990 affirming a judgment of County Court, Nassau County rendered March 28, 1986

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by the Royal Society

Order of Appellate Division

Sybil Hart Kooper, J.P.

Stanley Harwood

Vincent R Balledda, Jr.

Sandra Miller, jj.

Supreme Court of the State of New York
Appellate Division Second Judicial
Department.

1983E The People etc. respondent v
Rochelle Konits, Appellant. (Ind No
60664)

Ronald Podolsky, New York, N.Y. for
appellant. Dennis Dillon, District
Attorney, Mineola, NY. (Bruce E. Whitney
and John F. McGlynn of counsel), for
respondent.

Appeal by the defendant from a
judgment of the County Court, Nassau
County, (Harrington, J.) rendered March



28, 1986, convicting her of conspiracy in the fifth degree, criminal possession of a controlled substance in the fifth degree, criminal possession of a hypodermic instrument and violation of Public Health law Secs. 3335(1) and 3381(1), upon a jury verdict and imposing sentence.

Ordered that the judgment is affirmed. In this very bizarre case, the defendant, a physician, attempted to have one of her patients drug, kidnap and bring to her office another physician so that the defendant could engage in sex with him. In return for this, the defendant offered to provide her patient with illegal drugs. After this proposition was reported to the police, the defendant repeated the offer to her patient and a police informant. That conversation was recorded. The



defendant then furnished the patient and the informant with drugs and a hypodermic needle in furtherance of her plan. The defendant also gave the informant a prescription for valium without performing any medical examination upon him. Following the defendant's arrest, she admitted to the police that she wanted the intended victim brought to her office so that she might have sex with him.

Initially, we note that the court did not improvidently exercise its discretion in denying the defendant's application for a further examination pursuant to CPL 730.30 to ascertain her competency to stand trial. An examination pursuant to CPL 730.30 only months before the trial indicated that she was competent to stand trial and there was no evidence proffered to show that there had been any change in



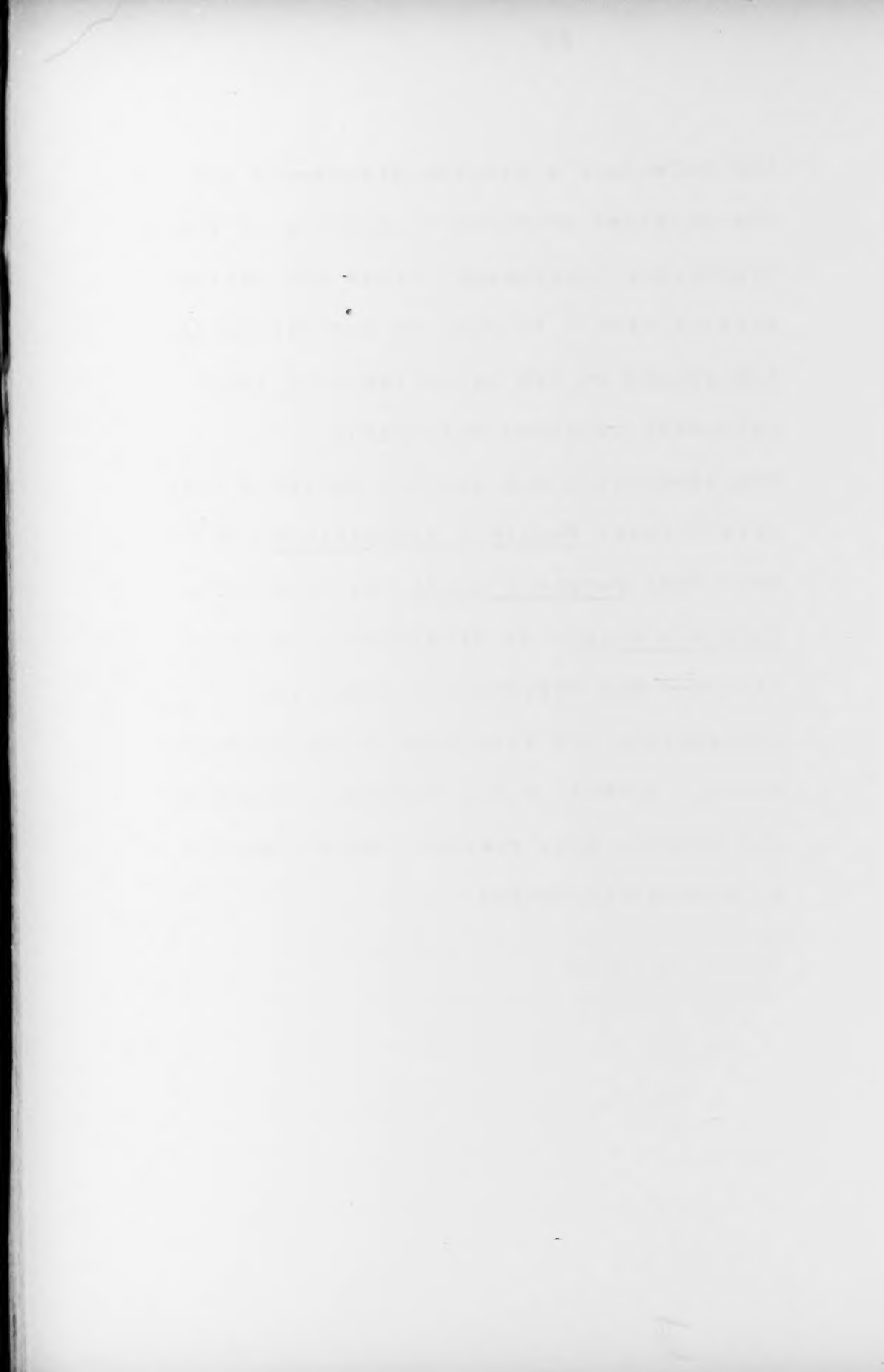
circumstances which would have necessitated a second examination.

(See, People v Gensler, 72 NY2d 239, cert denied, --- US ---, 109 S Ct 323; People v Kestin, 134 AD2d 453; People v Cox, 93 Ad2d 946).

We reject the defendant's argument that she was denied her constitutional right to a fair trial by virtue of ineffective assistance of trial counsel. The record reveals that trial counsel proceeded as effectively as possible in light of the overwhelming evidence of the defendant's guilt. He made numerous pretrial motions and obtained pretrial hearings, vigorously cross-examined the People's witnesses, and stressed unreliability and inconsistencies in their testimony. He further presented an aggressive opening and summation and proceeded as well as possible in light to

the defendant's damning statements and the physical evidence consisting of the hypodermic instrument, drugs and valium prescription. In sum, on our review of the record we are satisfied that the defendant received meaningful representation and was not denied a fair trial. (see, People v Satterfield, 66 NY2d 796; People v Baldi, 54 NY2d 137; People v Aiken, 45 NY2d 394). We have reviewed the defendant's remaining contentions and find them to be without merit. KOOPER, J.P., HARWOOD, BALLETTA and MILLER, JJ., concur. Enter: Martin H. Brownstein, Clerk.

Z
March 12, 1990



Trial Transcript excerpts

pp. 878-879

THE COURT: However, I would finally, once again, in conclusion to urge you in the strongest terms possible to listen to, consider, and, indeed follow your counsel's advice.

THE DEFENDANT: Then I'll tell you, sir, I'm not following counsel's advice. I just wanted for the record to be known that I consider the People's alleged addicts to be on parole, totally with personal motives. *****
(T879)

THE COURT: *** I urge you to follow your counsel's advice and at the same time make it clear to you that the ultimate decision is yours to testify or not to testify.***

UNITED STATES OF AMERICA

FROM THE FOUNDATION OF THE

CONSTITUTION TO THE PRESENT

DATE OF THE PUBLICATION

OF THIS EDITION

BY

THE

REPUBLICAN PARTY

OF THE

UNITED STATES

OF AMERICA

AND

THE

DEMOCRATIC PARTY

OF THE

UNITED STATES

OF AMERICA

AND

THE

REPUBLICAN PARTY

OF THE

p. 986.

THE COURT: Do you have any motions at the conclusion of the entire case, Mr. Wolfe?

MR. WOLFE [defense Counsel] Yes, your honor First, May I please with the Court's permission withdraw my previous request that the Court charge specifically with regard to the matter of the affirmative defense of duress. I urge the Court to allow me to withdraw that application.

THE COURT: All right. That will be granted.